

In re: Brabson *et al.*
Serial No.: 10/045,556
Filed: January 11, 2002
Page 6 of 10

REMARKS

Applicants appreciate the thorough examination of the present application as evidenced by the Final Office Action of December 29, 2005. Applicants also appreciate the Examiner's willingness to discuss the present application with Applicants' undersigned representative. Applicants have amended independent Claims 1 and 23 to further clarify the distinction between the claims of the present application and the teachings of the cited references. Applicants respectfully request that these amendments be entered as Applicants' Amendment merely makes explicit what was previously implicit in the claims. Accordingly, Applicants respectfully submit that the pending claims are in condition for allowance for at least the reasons discussed herein and in Applicants' Amendment of October 25, 2005 (hereinafter "Applicant's October Amendment").

The Section 102 Rejections

The Final Office Action maintains the rejections of all the pending claims set out in the previous Office Action of July 25, 2005. In the interest of brevity, Applicants will not repeat all of the arguments set out in Applicants' October Amendment. However, the arguments set out in Applicants' October Amendment are hereby incorporated herein by reference as if set forth in their entirety. Applicants will only respond herein to the new arguments presented in the Response to Arguments section of the Final Office Action and provide an additional argument with respect to the 103 rejection.

In particular, the Final Office Action states that "Applicant's characterization of Buhrke is not entirely accurate." *See* Final Office Action, page 2. The Final Office Action proceeds to explain that "[t]he determination of whether the application should be modified takes place in both the terminal application and the switch..." *See* Final Office Action, pages 2-3. Applicants respectfully submit that Applicants' characterization of Burke is entirely consistent with the explanation provided in the Final Office Action. *See* Applicants' October Amendment, page 10, first paragraph. As is clear in Applicants' October Amendment, Applicants acknowledge that "both" the switch and the terminal application are involved, however, as also noted therein if both the terminal equipment and the switch reach an agreement, the virtual channel can be established having these minimum agreed upon quality of service terms. As further discussed in Applicants October Amendment, Buhrke also discusses modification of the quality of service terms after the virtual channel has been set

In re: Brabson *et al.*
Serial No.: 10/045,556
Filed: January 11, 2002
Page 7 of 10

up. *See* Buhrke, column 5, lines 34-46. This modification, however, is initiated by the switch by requesting a load reduction from the terminal equipment. *See* Buhrke, column 5, lines 37-39.

In contrast, amended Claim 1 recites "analyzing the generated notification, *at the currently-executing application*, by consulting one or more criteria" and "determining *at a currently-executing application*, based on the analysis, whether *the currently-executing application should modify a behavior of the currently-executing application*." Independent Claim 23 contains similar system recitations. Thus, the currently-executing application actually analyzes (as amended, but previously implied) and determines if a modification is needed and modifies its own behavior. In other words, as stated in the specification of the present invention, "the file or traffic system is adapted for the current environmental conditions during its creation – that is, by the application which originally creates the data." *See* Specification, page 15, lines 9-11. In Burke, the application is not aware of the environmental conditions, it just receives rates from the switch that it may either reject or accept. *See* Final Office Action, page 3 and Burke, column 5, lines 10 through 14 and lines 20-33. Accordingly, nothing in Buhrke discloses or suggests analyzing ... *at a currently-executing application...or determining at the currently-executing application*, based on the analysis, whether *the currently-executing application should modify a behavior of the currently-executing application* as recited in amended Claims 1 and 23 for at least these additional reasons.

Furthermore, the Final Office Action states that "the amended claims merely disclose that there is a determination step performed at a currently-executing application and does not explicitly claim again interaction with another device as part of the determination process." *See* Final Office Action, page 3. Applicants respectfully submit that the fact that the analyzing occurs at the currently-executing application was implicit in the claims and explicit in Applicants' arguments, however, Applicants have amended Claims 1 and 23 to positively recite this aspect to expedite prosecution of this matter. Applicants respectfully request entry of this amendment for at least these reasons.

With respect to the dependent claims, the claims add detail to the steps of the method recited in Claim 1. Thus, for example, Claims 3 through 9 add details with respect to the modification step of Claim 2. As recited therein, the modification is performed at the currently-executing application. As discussed above, nothing in Burke discusses performing

In re: Brabson *et al.*
Serial No.: 10/045,556
Filed: January 11, 2002
Page 8 of 10

these steps at the currently executing application. For example, with respect to Claim 9, the Final Office Action points to column 6, lines 55-60 of Buhrke as providing the teachings. However, the cited portion of Buhrke clearly discusses action of the switch, not the currently-executing application. Thus, the dependent claims are patentable over Buhrke for at least these additional reasons.

With respect to Yamato, the Final Office Action states that the "cell traffic regulation unit" corresponds to the currently-executing application." See Final Office Action, page 4. Applicants respectfully submit that the cell traffic regulation unit of Yamato cannot be the currently-executing application as recited in Claim 1. In particular, Yamato states:

The cell traffic regulation unit 200 has a regulation unit 201 for monitoring the cell flowing into the node system 112 through a connection 121, a control unit 202 for controlling the regulation unit 201 to regulate the cell flow on the connection 121, and a congestion detection unit 203 for detecting the occurrence of the congestion in the node system 112 by monitoring the cell flowing out from the node system 112 through a connection 122. This cell traffic regulation unit 200 is to be attached at any connection in the ATM network for which the monitoring is desired.

See Yamato, column 5, lines 53-62. Thus, the cell traffic regulation unit of Yamato does just that, it regulates/monitors traffic sent between applications, but is not a currently-executing application as recited in Claim 1. Thus, the claims of the present application are patentable over Yamato for at least these additional reasons.

The Section 103 Rejection

Claim 8 still stands rejected under 35 U.S.C. § 103(a) as being anticipated by Buhrke in view of United States Patent No. 5,938,743 to Nahidipour et al. (hereinafter "Nahidipour"). See Office Action, page 10. Applicants respectfully submit that dependent Claim 8 is patentable at least per the patentability of independent Claim 1 from which it depends. However, Claim 8 is also separately patentable over the cited combination.

There is no motivation or suggestion to combine the cited references as suggested in the Office Action. As affirmed by the Court of Appeals for the Federal Circuit in *In re Sang-su Lee*, a factual question of motivation is material to patentability, and cannot be resolved on subjective belief and unknown authority. See *In re Sang-su Lee*, 277 F.3d 1338 (Fed. Cir. 2002). It is improper, in determining whether a person of ordinary skill would have been led to this combination of references, simply to "[use] that which the inventor taught against

In re: Brabson *et al.*
Serial No.: 10/045,556
Filed: January 11, 2002
Page 9 of 10

its teacher." *W.L. Gore v. Garlock, Inc.*, 721 F.2d 1540, 1553, 220 U.S.P.Q. 303, 312-13 (Fed. Cir. 1983).

The Final Office Action states:

It would be obvious to one of ordinary skill in the art at the time the time of the invention to modify Buhrke *et al.* by changing thread assignments (e.g. reducing threads) of a currently executing application, as taught by Nahidipour *et al.* in order to endure improved data transfer efficiency, lower utilization of system resources, and memory as number of threads for system calls is reduced.

See Office Action, page 10 (citations omitted). This motivation is a motivation based on "subjective belief and unknown authority", the type of motivation that was rejected by the Federal Circuit in *In re Sang-su Lee*. In other words, the Final Office Action does not point to any specific portion of the cited references that would induce one of skill in the art to combine these particular cited references as suggested in the Final Office Action. If the motivation provided in the Final Office Action is adequate to sustain the Office's burden of motivation, then anything that would "endure improved data transfer efficiency, lower utilization of system resources ..." would render a combination obvious. This cannot be the case. Accordingly, the statement in the Final Office Action with respect to motivation does not adequately address the issue of motivation to combine as discussed in *In re Sang-su Lee*. Thus, it appears that the Final Office Action gains its alleged impetus or suggestion to combine the cited references by hindsight reasoning informed by Applicants' disclosure, which, as noted above, is an inappropriate basis for combining references.

Furthermore, Buhrke discusses bandwidth and congestion management in accessing broadband ISDN networks as recited in the title. Nahidipour discusses using the UNIX physio to allow data to be transferred on a plurality of channels concurrently as recited in the title. Nothing in the cited references or the art itself would motivate a person of skill in the art to combine Buhrke and Nahidipour as suggested in the Final Office Action. Furthermore, even if Buhrke and Nahidipour could be properly combined, the combination of would not teach the recitations of the pending claims for at least the reasons discussed herein and in Applicants' October Amendment.

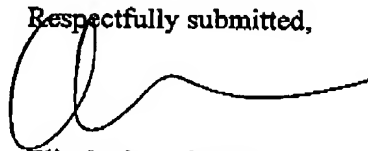
CONCLUSION

Applicants respectfully submit that pending claims are in condition for allowance for at least the reasons discussed above. Thus, allowance of the pending claims is respectfully

In re: Brabson *et al.*
Serial No.: 10/045,556
Filed: January 11, 2002
Page 10 of 10

requested in due course. Favorable examination and allowance of the present application is respectfully requested.

Respectfully submitted,



Elizabeth A. Stanek
Registration No. 48,568

USPTO Customer No. 46589
Myers Bigel Sibley & Sajovec, P.A.
Post Office Box 37428
Raleigh, North Carolina 27627
Telephone: (919) 854-1400
Facsimile: (919) 854-1401